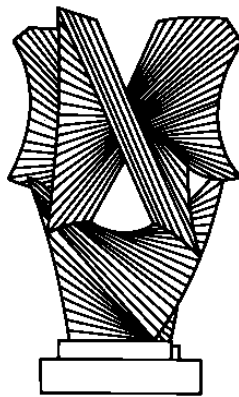


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The Many Faces of Fault in Contract Law: Or How to Do Economics Right, without Really Trying

Richard A. Epstein

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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**THE MANY FACES OF FAULT IN CONTRACT LAW:
OR HOW TO DO ECONOMICS RIGHT,
WITHOUT REALLY TRYING**

*Richard A. Epstein**

*Modern law often rests on the assumption that a uniform cost/benefit formula is the proper way to determine fault in ordinary contract disputes. This Article disputes that vision by defending the view that different standards of fault are appropriate in different contexts. The central distinction is one that holds parties in gratuitous transactions only to the standard of care that they bring to their own affairs, while insisting on the higher objective standard of ordinary care in commercial transactions. That bifurcation leads to efficient searches. Persons who hold themselves out in particular lines of business in effect warrant their ability to achieve uniform standards, while individuals who seek favors from their friends are incentivized to choose them carefully given the subjective standard of care. These results, moreover, derive from the Roman conceptions of care brought into the Anglo-American law through the 1703 decision in *Coggs v. Bernard*, and are shown to have surprising durability in dealing with agency, medical malpractice, occupier liability, guest statute and frustration cases. Often the efficient standard of fault is given only to those who do economics without really trying.*

Introduction: From Fault to Negligence—and Back

Any symposium devoted to the role of “fault” in the law of contract is likely to span not only the law of contract but also the adjacent and overlapping field of tort. The uncertain boundaries of this Symposium stem from the persistent ambiguity in the definition of fault itself. In many modern iterations, “fault” is the equivalent of the term “negligence.” But that is definitely not the case if the definition of fault in tort law tracks the Hand formula, which compares the burden of precaution (B) with the expected losses, as defined by the probability of loss (P) multiplied by the expected severity

* James Parker Hall Distinguished Service Professor of Law, The University of Chicago. Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; visiting Professor of Law, New York University School of Law. My thanks to Omri Ben-Shahar and Ariel Porat for their insightful comments on an earlier draft of this paper and to Jack O. Snyder, University of Chicago Law School, Class of 2010 for his excellent research assistance.

of the loss (L),¹ without any reference to the role of custom that Hand discussed in his earlier opinion in The T.J. Hooper.² Nonetheless, since the publication of Richard Posner’s influential early article, the rigid Hand formula has been taken to be the dominant, if not the sole, test of tort liability, to which all other liability rules are subordinate.³

In this Article I reject on both normative and positive grounds any purported equivalence between the Hand formula and the idea of fault in contract law. The term “fault” in contract law offers a broad signal that one of a range of standards of blameworthiness applies, depending on context. In its broader sense, the term “fault” is paired with blameworthiness as well as negligence.⁴ But in a narrower sense—found in the thesaurus⁵—“fault” and “negligence” actually fall into separate domains without direct overlap. The list of synonyms for fault includes “error,” “weakness,” “responsibility,” “liability,” and “burden.” Add “blameworthy” into the mix, as well as the terms “guilty,” “culpable,” and “at fault.” “Negligence” for its part does connote “fault,” but with a more focused set of meanings that implies some want of care: “carelessness,” “inattention,” “laxity,” “slackness,” and “disregard.” To add to the confusion, some sources conflate the notion of negligence and culpability.⁶

In some sense, the inexactness of these common definitions should come as no surprise. Ordinary people do fairly well in their lives without ever making the linguistic differentiations that are mother’s milk to lawyers. But for our purposes, the notion of fault must be refined to reflect the differences among intentional harm, willful indifference, recklessness, gross negligence, failure to respond to known dangers, the failure to investigate to identify hidden hazards, and the failure to guard against great perils. It is therefore foreordained that some element of fault is in the law of contract. The task of the law of contract is to identify which standard applies in what context and why.

The problems here are two-fold. First, contract law covers all agreements in which people agree to either perform or abstain from certain actions, with few, if any, subject matter restrictions. This huge class of enforceable agreements is highly heterogeneous. The standard of care for the

¹. See United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947).
². 60 F.2d 737 (2d Cir. 1932).
³. See Richard A. Posner, A Theory of Negligence, 1 **J. Legal Stud.** 29 (1972). For a rejection of the Hand formula see Richard A. Epstein, A Theory of Strict Liability, 2 **J. Legal Stud.** 151, 155–60 (1973).
⁴. See **Funk & Wagnalls Dictionary** 461 (1982).
⁵. Namely, the thesaurus feature on Microsoft Word.
⁶. For example, see **F.H. Lawson, Negligence in the Common Law** 77–78 (1950), where even the choice of the title tilts the inquiry by equating the notion of culpa with negligentia, or negligence, when the more accurate translation is “culpable,” Funk & Wagnalls captures the ambiguity. “Culpa: fault, especially of negligence. Culpable: Deserving of blame or censure.” **Funk & Wagnalls**, supra note 4, at 314.

nondelivery of goods need not be the same as the standard of care for complex partnership transactions. Second, the level of variation within the law of contract also depends on how broadly we define the sphere of contract law relative to its near neighbor, tort. That overlap is most acute in cases that involve the destruction or loss of property arising out of a consensual transaction. Modern law tends to treat these cases under tort law. I defend the earlier view that uses contract law to govern these cases, reserving tort law for harms that occur between strangers. The greater the fraction of the legal terrain governed by contract law, the greater the heterogeneity in fault standards.

In order to work out the arrangements between these various cross currents, I proceed as follows. I argue that as a first principle, this tort/contract line should be placed between (1) physical injuries that arise between neighbors and strangers and (2) physical injuries that arise between parties who are bound together by a prior consensual arrangement that could, in principle, allocate the risk of loss between the parties. Part I sketches out the reasons, based on the comparison of sporting events with sharp boundary lines, why negligence should tend to be the odd man out, with strict liability and intentional harms doing the bulk of the work in both stranger and consensual arrangement cases. Part II argues that physical harms that arise in the course of consensual arrangements should be treated under a contract law framework. It also explains why we rightly expect a greater variation in the use of fault in the consensual cases than we do in the neighbor and stranger cases. Part III then turns to the Achilles' heel of the common law: the proper treatment of gratuitous transactions, first for bailments and agency relationships, and then, briefly, in medical malpractice, occupier liability, and guest statute contexts. Throughout this Part, I focus a great deal on Roman law conceptions of fault, identifying how modern courts have made use of them, and suggesting that an even greater use would have been beneficial, resulting in a lot less confusion over what should be the proper standard of fault. Finally, Part IV examines the influence of the seminal case of Coggs v. Bernard⁷ in traditional frustration cases and compares the approach that allows for multiple standards of fault with the modern tendency to collapse all questions on the standard of care into a cost/benefit formula, concluding that the earlier approach is superior to the modern one—even on economic grounds.

I. Tort Law

Historically, tort law dealt primarily with a well-defined class of cases in which one person sought to hold another person liable for the physical invasion of his person or property. Defined in

⁷. 92 Eng. Rep. 107 (Q.B. 1703).

this fashion, the law of tort deals chiefly with trespass and nuisance, fire, animals (including cattle trespass),⁸ and liability under the rule of Rylands v. Fletcher.⁹ In these cases, I have long defended the view that negligence principles need not be used at all.¹⁰ After all, the defendant seeks to gain privately by his actions, and is willing to throw any collateral losses onto the plaintiff. One way to deal with this is through a tort system that asks whether the defendant has taken the right standard of care. But it is both simpler and more expedient to fasten the liability on the party whose invasive conduct initiated the interaction, unless the plaintiff took that risk—a contract defense to a tort action—or otherwise misbehaved, at which point it becomes important to consider possible schemes for the division of loss to reflect the inputs on both sides.

One piece of evidence that suggests the efficiency of these standards is their use in consensual arrangements, such as games that involve boundary lines—fair and foul in baseball, in or out of bounds in basketball, and so on. These output rules are adopted to maximize the gains from participation in the game. In each of these cases, the sharp line determines the consequences of the play, so that matters of luck and skill are irrelevant to the result. The system works because good outcomes correlate strongly with higher skill levels over the long run. Indeed, when the output-based rule does not apply, the shift is typically not to negligence, but to some form of intentional harm—the beanball in baseball, the flagrant foul in basketball—that elicits some criminal-like responses. These examples suggest that similar output rules should be used to determine the rules of the road or to resolve boundary disputes. As for the former, we need only assume that a single common owner will set the rules of the road to maximize his own revenues, which will only happen if it maximizes the welfare of the persons who sign up for the system.¹¹ Hence the use of output-based rules, not care levels, for determining liability in traffic accidents, at least in routine transactions.¹²

This bifurcated system should likewise have much resonance in dealing with boundary disputes between strangers, where once again negligence should be the odd man out. But historically, the law took a different path. Vaughn v. Menlove¹³ is generally credited with introducing the objective standard of care in negligence cases. Yet most suggestively, the defendant in Vaughn

⁸. See generally **Restatement (Second) of Torts**, §§ 504–05 (regarding livestock); *id.* §§ 506–18 (regarding animals other than livestock); *id.* § 520 (“Abnormally Dangerous Activities”); *id.* §§ 157–64 (regarding trespass to land; *id.* §§ 821A–840E (nuisance)). For a defense of the negligence approach in animal cases, see **Glanville Williams, Liability for Animals** (1939).

⁹. L.R. 3 H.L. 330 (1868), *aff’g Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866).

¹⁰. Richard A. Epstein, *supra* note 3.

¹¹. For a discussion of this concept, see Richard A. Epstein, Holdouts, Externalities and The Single Owner: Another Tribute to Ronald Coase, 36 **J. Law & Econ.** 553 (1993).

¹². See **H. Laurence Ross, Settled Out of Court** 98–99 (2d ed. 1980).

¹³. 132 Eng. Rep. 490 (C.P. 1837).

insisted that the appropriate rules for liability should be drawn from the law of bailments¹⁴—cases where one party delivers a chattel with a promise for its return at some future date. The unavoidable element of divided control in bailment cases makes the simple boundary-crossing rules used in boundary disputes and highway accidents a poor guide for the ultimate decision.

In Vaughan, the defendant built a hayrick near the plaintiff's land. Although often warned that internal fermentation could lead it to burst into flame, he did nothing to correct the situation, noting that since he had insurance, "he would chance it."¹⁵ The decision speaks at times of the defendant's "neglect," "gross negligence," and want of "ordinary prudence."¹⁶ The court declined, however, to let liability turn on whether the defendant "had acted honestly and bona fide to the best of his judgment," which to all appearances he had not, by insisting on an objective standard.¹⁷

Under the Roman law of bailments, the standard of care for loss or damage to the good varied from strict liability to good faith.¹⁸ In Vaughn, ironically, any conscientious application of the law of bailments would have imposed onerous duties on the defendant precisely because he gained all of the benefit (such as it was) from storing hay in so precarious a position.¹⁹ Indeed, the ordinary care standard was all too kind to the defendant in this case. The uniform tradition of liability in fire cases had been a strict liability standard, subject to some narrow exceptions, for fires set by the defendant lawfully on his land.²⁰ It would be wrong, however, to assume that strict liability ushers in a regime of absolute liability that admits of no defenses or exceptions: it allows defenses based, for example, on assumption of risk or the plaintiff's trespass.²¹ Note that the former of these defenses, if fully respected, allows contract rules to take over even in situations that, from the allegations in the plaintiff's case, sound as if they spoke about tort cases between strangers.

II. Moving the Tort/Contract Boundary: In Praise of Heterogeneity

Restricting the domain of tort necessarily expands the domain of contract law. In the Anglo-American system, the doctrine of consideration has hampered that transformation. That shortfall,

¹⁴ . Id.

¹⁵ . Id.

¹⁶ . Id.

¹⁷ . Id. The accurate (and economic) definition of good faith requires a defendant to treat the potential loss of the plaintiff as having equal weight to his own. For its application in connection to the duty to settle insurance claims within policy limits, see Merritt v. Reserve Insurance Co., 110 Cal. Rptr. 511 (Cal. Ct. App. 1973).

¹⁸ . See discussion infra Part III.A.

¹⁹ . See Vaughan, 132 Eng. Rep. 490 (opinion of Tindal, C.J.).

²⁰ . See Beaulieu v. Finglam, Y.B. 2 Hen. 4, fo. 18, pl. 6 (1401); Tuberville v. Stamp, 91 Eng. Rep. 1072 (1697).

²¹ . See, e.g., Robert Addie & Sons (Collieries), Ltd. v. Dumbreck [1929] A.C. 358.

moreover, is not easily corrected by the principle of detrimental reliance as articulated in Section 90 of the Second Restatement of Contracts,²² which has never systematically governed all gratuitous transactions. These gratuitous transactions thus revert by default into tort law. This netherworld covers gratuitous bailments, gratuitous licensees to enter the property of another, gratuitous principal-agent relationships, and the gratuitous provision of medical services.

When the modern law switches these problem areas from contract to tort, it upsets the overall structure of both areas, and thus increases the difficulty in applying the elusive fault principle. There is little intuitive doubt that gratuitous transactions are not fertile ground for the strict liability rules that dominate stranger cases. Far from having a situation in which the plaintiff bears the cost of some activity from which the defendant obtains all the gain, now the plaintiff seeks to hold accountable a defendant who has sought to provide her with a service at no charge. Pulling these cases out of tort law thus unifies the tort side of the equation by removing a major obstacle in the path of adopting a uniform strict liability theory—or for that matter a uniform theory of objective negligence, should that be desired.

In addition, including gratuitous transactions in the law of contract helps rationalize the default rules in that field. In tort, the major objective is to defend the boundaries between persons: “keep off my person, my chattels, and my property.” In contract, however, separating the parties is usually not the object of cooperative ventures. No longer must the law neutralize a defendant’s efforts to internalize gain and externalize losses, creating the risk of excessive levels of harm. Instead the dominant inquiry asks what ex ante rule maximizes the joint welfare of the parties to the transaction in question. So stated, it becomes instantly clear that the huge variety of contractual transactions resists the adoption of any uniform standard of liability, or, as will become clear, damages of the type that governs relationships between strangers. One-size-fits-all is never the correct approach in a world of heterogeneous transactions. It is therefore instructive to examine how the case law deals with the tort/contract interface.

III. Gratuitous Transactions: Bailment and Agency

A. *Coggs v. Bernard*

Historically, the most important treatment of gratuitous transactions is Coggs v. Bernard, which lies at the crossroads of Roman and English law.²³ As often happens, Coggs arose out of the

²². Restatement (Second) of Contracts § 90 (1988).

²³. 92 Eng. Rep. 107 (1703). Coggs explicitly overrules Southcote v. Bennett, 4 Coke 83, 78 Eng. Rep. 1041, Cro. Eliz. 815, which held the gratuitous bailee to a high objective standard of care.

most prosaic of circumstances. The plaintiff owned a number of casks of brandy, which the defendant had moved from one place to another. During the move, the casks split open, and much of the brandy was lost. The plaintiff sued to recover for his losses, which could be easily seen as a tort action for harm caused by the defendant. The defendant resisted liability on the grounds that the plaintiff had not alleged either that the defendant was a common porter or that he had received any reward or consideration from the plaintiff for his work.

Both elements of the defense have their purpose. Common porters always hold themselves out to work for others by making the implicit representation that they will conduct themselves in accordance with industry standards. To use the old but accurate Roman expression, the standard of care for common porters under Roman law was culpa levis in abstracto, where the “abstracto” signaled an objective standard of care that allowed for no variation by defendants within the designated class.²⁴ There is a good information-cost explanation for these cases. The usual business cases involve persons that handle a large volume of traffic from customers with whom they have no particular relations. Employing a subjective standard would put a high burden on the individual customers to figure out the level of care of which this particular defendant is capable, a tricky task in dealing with, say, movers with whom the property owner has no past relationship. In contrast, the use of an abstract, or objective, standard encourages a potential merchant to withdraw from the field if he cannot meet that objective standard. Minimizing search costs enhances the security of transactions.

That standard is contrasted with culpa levis in concreto, where “concreto” refers to the particular or “concrete” circumstances of each case, and thus invites use of a subjective standard. The Roman definition here speaks of “talem igitur diligentiam praestare debet, qualem in suis rebus adhibere solet,” which in English means that the defendant ought furnish only that standard of care that he brings to his own affairs.²⁵ That subjective standard applied under Roman law—and, as Chief Justice Holt observed, makes eminently good sense²⁶—where a property owner is asking a favor of a friend. The friend is not normally in business, and is known to the owner. Both reasons for the objective standard drop out of the picture. Asking the defendant to use the same level of care that he does in his own affairs means that this standard is always attainable. In these informal transactions,

²⁴. Literally “slight negligence by an objective standard,” by which it is meant that slight negligence is sufficient to create liability.

²⁵. See **Justinian’s Digest**, 10, 2.25, 16.

²⁶. See Coggs, 92 Eng. Rep. at 110–11.

the owner of the brandy faced with this sliding standard of care protects himself by selecting the right friends to do the work.²⁷

Chief Justice Holt, moreover, did not stop there. Rather, he borrowed wholesale the Roman approach to bailments which he then applied to this particular case. He finessed the defendant's objection based on consideration as follows: "[T]he owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from one place to the other such a day, the defendant had not been bound to carry them."²⁸ His formulation closely tracks Roman law. To be sure, these arrangements are a gift of services as opposed to a gift of goods. But the two situations share the same general rule, which refuses any executory enforcement of a gift promise, while recognizing that the gift is complete on delivery. Chief Justice Holt's reference to consideration only muddies the waters, since the decision in Slade's Case,²⁹ about 100 years earlier, allowed executory enforcement of any promise supported by consideration.

Denying executory enforcement does not, however, fill out all the incidents of this arrangement. What is the proper standard of care if the goods are damaged, destroyed, or stolen while in the hands of the bailee? That problem never arises with the outright gift of goods or services, because the passage of ownership makes it easy to apply the maxim res perit domino, which literally means that the thing perishes for the owner, or as we would say today, that the risk of loss falls on the owner. The Romans applied that solution to the gratuitous contract of mutuum—a transfer of fungible goods for consumption, where the obligation is the return of goods of like kind sometime in the future.³⁰ But with bailment, the same objects must be returned, so that the loss cannot be easily assigned to one party or the other.

In Coggs itself, Chief Justice Holt wrote as though the standard of ordinary care applied, deviating from the Roman principles he had incorporated into English law. To see Holt's error requires understanding the six different kinds of bailments developed in Roman law.³¹ The first of these is depositum, the gratuitous bailment for safekeeping—a transaction done for the benefit of the bailor. The standard of care reflects the bailee's favor, by holding that bad faith or gross neglect is the

²⁷ . Id.

²⁸ . Id. at 113.

²⁹ . 76 Eng. Rep. 1072 (1602).

³⁰ . On mutuum generally, see **Barry Nicholas, An Introduction to Roman Law** 167, n. 4, 169 (1962).

³¹ For a general discussion of the rules of bailment, see W.W. Buckland, *A Text-Book of Roman Law* (P. Stein ed.) 459-62 (discussing mutuum), 464-67 (discussing depositum), 467-70 (discussing commodatum), 470-78 (discussing pledge, or *pignus*), 494-504 (discussing *locatio*, or lease), and 512-18 (discussing mandatam).

standard of liability. The beauty of this particular rule is that it forces the bailor to take the risk that the chosen bailee does not meet some objective standard of care—yet another deviation from the Hand formula, $B = PL$. Nor is the bad faith/gross negligence test difficult to administer in most bailments for storage, because the rule does not typically turn on a psychological examination of the defendant’s capabilities, but on the application of a general nondiscrimination principle: does the defendant bring the same level of care to the plaintiff’s goods as he brings to his own? If the plaintiff’s goods are stored together with the defendant’s possessions, the risk of loss falls on the plaintiff. If not, and the level of care taken is lower, the risk falls on the bailee. The rule, like all rules, does not resolve every factual variation, but its simple solution works in most cases. And if the parties want a different standard, they can stipulate expressly.

Now suppose the defendant is also under a gratuitous obligation to manage, not just to store, the bailed goods, as in Coggs. Holt explicitly classifies the contract as one for limited agency, called mandatum, which follows the risk allocation rule for gratuitous bailments. Once again, the principal cannot demand executory enforcement of the contract if the promisor does not choose to carry out the task, at least so long as he gives the owner an opportunity to set up alternative arrangements, including some that could require payment for the same services. But once the agent begins to manage goods, the same good faith standards apply, with reference to the level of care that the defendant brings to his own affairs. In this context, the simple negligence standard to which both Chief Justice Holt and Justice Gould gravitate does not fit the Roman pattern, which would settle for liability based on gross neglect. Yet Holt appears to set the standard far higher than simple negligence, noting that for the bailee to escape he would have to show the wrongful act of a third party, as if a stranger punctured a hole in the casks.³²

Coggs is of course a long way from the converse situation of commodatum, or loan for use, where goods are lent for the benefit of the bailee, rather than stored for the benefit of the bailor. Commodatum typically requires a higher level of care, even if the bailor knows of the defendant’s personal foibles and shortfalls. Accept goods for your own advantage, and you are usually duty bound to return them. But here, too, fault in contract law does not collapse into the Hand formula. Rather, as in the fire cases, strict liability applies except when the destruction of the goods is attributable to acts of God—huge storms and the like—or to violent actions by third persons, to which Holt alluded.³³ The rule can be further refined to reimpose liability whenever the bailee has some antecedent awareness of the risk which would allow him to move the bailed goods to a safer

³². Coggs, 92 Eng. Rep. at 113.

³³. Id. (“As if a drunken man had come by in the streets, and had pierced the cask of brandy”).

location. But by the same token the plaintiff's loss is not compensable if the same natural or human events would have destroyed the goods if they had remained in the hands of its original owner. Incremental, not total, risk determines the liability standard.

Last are the commercial cases that are undertaken for the mutual benefit of both parties. The term "benefit" covers all forms of tangible gain, but excludes the warm glow that animates most gratuitous transactions. These transactions include the simple pawn (vadium), where the goods stand as security for an unpaid loan; the contract of hire; or bailments where the bailee is paid a fee to manage or operate the thing bailed. These paid variations of the simple deposit or mandate call for a standard of ordinary care given the prospect of mutual gain.

This standard of ordinary care for lost goods comes closest to the Hand formula. But even it still deviates from a strict cost/benefit approach. Rather, ordinary care has a closer affinity to the customary standard of care normally observed in a given trade or business. To be sure, the ordinary care standard and the Hand formula have the same ultimate objective, which is to introduce efficient levels of precaution by the parties. But the direct attack undertaken by the Hand formula on a case-by-case basis requires the use of costly and unreliable expert evidence with two negative consequences. First, it gives no information about the appropriate standard in advance. Second, it increases the cost of litigation after the fact because of the wide variation in estimates that rival experts can easily gin up. The ordinary care standard is hardly perfect but it supplies better information at both stages. And it relies on the constant refinement of customary rules to make these transactions more efficient. The key point, therefore, is that this standard does not allow a plaintiff to show, as in The T.J. Hooper,³⁴ some supposed gap between an established industry custom and the efficient standard of care. No court could on the older view reject custom because of its own independent cost-benefit analysis. That custom yields only to a legislative override, which takes place solely because statutes outrank custom in the legal hierarchy.³⁵ The endless number of misguided lawsuits that rest on frontal assaults on custom is testimony to the wisdom of the earlier position.³⁶

³⁴. 60 F.2d 737 (2d Cir. 1932), aff'g 53 F.2d 107 (S.D.N.Y. 1931). For a showing of how Hand mangled the evidence on custom, see Richard A. Epstein, The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort, 21 **J. Legal Stud.** 1 (1992).

³⁵. For the most influential statement, see Ezra Ripley Thayer, Public Wrong and Private Action, 27 **Harv. L. Rev.** 317, 321–23 (1914).

³⁶ See, e.g., Barker v. Lull Engineering Co., 373 P.2d 443 (Cal. 1978), which announced a two-part test of product defect that exposed the manufacturer of its High-Life Loader to the misconduct of both its purchaser and driver.

B. Thorn v. Deas

The bailment cases illustrate the protean visions of fault that are deployed in consensual arrangements. But since Anglo-American law places the tort/contract boundary in the wrong place, the cases following Coggs are prone to confusion and error. In Thorne v. Deas,³⁷ the plaintiff and defendant were co-owners of a ship of which the plaintiff was the captain. The defendant had promised the plaintiff before he set sail that he, the defendant, would insure the ship, which he failed to do. The plaintiff then sued him for his share of the loss when the ship was wrecked at sea. Chancellor Kent held that Coggs did not govern because no specific goods had been bailed.³⁸ The transaction was, under the Roman classification, mandatum: a simple mandate. Accordingly in the absence consideration, the defendant could not be sued for gross neglect in the absence of misfeasance, of which there was none since he had just forgotten to take out the insurance.

Unfortunately, the misfeasance/nonfeasance distinction Chancellor Kent invokes is miscast. The two parties were not strangers, to whom the no-duty-to-rescue rule applied. Rather, they were co-owners.³⁹ In terms of their ordinary business expectations, the total failure to act is a greater breach than a good faith effort to fill out forms that goes awry (for which a defense might actually be available). Calling the latter a misfeasance cannot paper over the difference between entering the wrong information on an insurance form and the use of force, the setting of traps, or the accumulation of dangerous substances, to the detriment of a stranger. Thorne thus gets the wrong answer because it asks the wrong question. Here the defendant is at fault because he did not do what he had promised. To be sure, as it is a gratuitous transaction he should have all of the defenses based on vis maior, the actions of third parties, and even his own shortfalls, which were likely to be minor given that he was a co-owner.⁴⁰ But since none of these defenses actually applied, the case should have come out the other way, as it does under the Roman conceptions.

C. Siegel v. Spear and Comfort v. McGorkle

Coggs and Thorne create a delicate and unprincipled line between contracts of bailment and agency, which in turn gives rise to further unnecessary refinements. Thus in Siegel v. Spear & Co.,⁴¹ the plaintiff purchased furniture from the defendant subject to a mortgage to secure the price. The

³⁷ . 4 Johns. 84 (N.Y. Sup. Ct. 1809).

³⁸ . Id. at 99.

³⁹ . Id. at 84.

⁴⁰ For a recent discussion of vis maior, see, In re Flood Litigation, 607 S.E. 2d 863, 879 (W.Va. 2004); for a nineteenth century account, see Nichols v. Marsland, 2 Exch. D. 1 (1876).

⁴¹ . 138 N.E. 414 (N.Y. 1923).

plaintiff made a collateral promise not to remove the furniture from his apartment until the mortgage had been paid off. Subsequently, he approached the defendant's credit officer for help while he was away during the summer months. A deal was struck that the furniture would be moved into the defendant's warehouse. Since it was not insured, the defendant's credit officer offered free of charge to insure the goods while in storage, billing the plaintiff for the fees. He failed to do so, and an action was allowed when the goods were destroyed.

Thereafter, the court distinguished Thorne v. Deas on the ground that in Spiegel the promise to insure was incident to the bailment, while in Thorne it was a "naked" promise not tethered to any property transaction.⁴² The court extended Coggs to cover a collateral promise that went beyond the care of the thing—a cross between bailment and mandate. But it nonetheless rejected the Roman view of gratuitous agency, or mandate, unrelated to the delivery of the property. A decade later in Comfort v. McGorkle⁴³ the court duly distinguished Spiegel by denying recovery where the defendant had simply promised to process the plaintiff's proof of loss in a timely matter with the insurance carrier, wholly unrelated to any bailment. Given all this, can there be any doubt that the conception of fault that is used in the Roman cases is superior to the set of artificial distinctions that grows up around the faulty definition of consideration used in Coggs and the misfeasance/nonfeasance distinction in Thorne?⁴⁴

D. Medical Malpractice, Occupier's Liability, and Guest Statutes

Coggs v. Bernard and the Roman categories of fault remain influential outside the context of bailment and agency. Three areas of tort law deserve some brief mention: medical malpractice, liability of owners and occupiers to persons lawfully on their premises, and liability of automobile drivers to their guests. Historically, all three areas observed the line between gratuitous and commercial arrangements in setting the standard of care in line with the parties' reasonable expectations.

In medical malpractice cases, the patient who receives charitable care has received a gift of expensive services. No payment covers a premium for liability insurance, so the standard of ordinary negligence is out. Some few cases could turn on gross neglect, but generally a hospital was protected by the rule of charitable immunity. Individual physicians were judged on a rule akin to gross

⁴². Id at 482–83.

⁴³. 268 N.Y.S. 192 (N.Y. Sup. Ct. 1933).

⁴⁴. These confusions arise in more modern cases. See, e.g., Kremen v. Cohen, 337 F.3d 1024 (9th Cir. 2003), critiqued in Richard A. Epstein, The Roman Law of Cyberconversion, 2005 **Mich. St. L. Rev.** 103.

negligence, which again reflects the gratuitous nature of the transaction. And the stranger cases that did not fall within this rationale were still judged by a strict liability rule.⁴⁵

The traditional view of owner and occupier liability set different standards of care for licensors—really, owners of residential premises—and inviters—owners of commercial premises.⁴⁶ The ordinary houseguest does expect safer conditions than the owner or occupier creates for himself and his family, so the greatest protection lies in the risk that owners take when they expose their guests to latent dangerous conditions of which they have knowledge and the guest does not. As with bailments, the guest’s best defense lies in the selection of those persons to visit. Businesses take all comers and are subject to the same objective standards used for warehousemen in bailment cases. These categories have tended to give way, both by statute and by common law decision, to a uniform standard of reasonable care under the circumstances. But that false generalization hardly counts as an overall improvement.

The modern transformation of occupier’s liability in the United States dates to Rowland v. Christian,⁴⁷ which attacked the older standard of care owed to licensees.⁴⁸ That standard rightly turned on the asymmetrical information between the parties. The occupier was responsible for latent hazards known to him but not the plaintiff. For all of Justice Peters’s huffing and puffing about that obsolete distinction, the facts of Rowland strikingly confirm the older rule: the plaintiff recovered for harm caused by a latent defect in a bathroom fixture known to the defendant but not the plaintiff. On this view, an owner also risks injury from any latent defect, so that the entrant is still protected by a nondiscrimination principle.⁴⁹ He is exposed only to those risks that the occupier is exposed to. Another sign of the durability of the older standard lies in premise liability statutes for recreational property, which do not even require a specific warning, but which generally warn entrants who hunt or hike that they use the premises at their own peril, given the inability of the property owner to warn of known perils to a undifferentiated group.⁵⁰ The gap between an open field and a kitchen floor is sharp enough to allow for categorical distinctions.

Guest statutes also adopted distinctive rules for gratuitous transactions, by imposing a higher standard on the driver of an automobile to strangers than to guest passengers, who knew something

⁴⁵. Just this distinction is taken in Powers v. Massachusetts Homeopathic Hospital, 109 F. 294, 304 (1st Cir. 1901).

⁴⁶. For an articulation of the old distinction, see Robert Addie & Sons (Collieries), Ltd. v. Dumbreck, [1929] A.C. 358. For the American reception, see **Restatement (Second) of Torts**, § 342.

⁴⁷. 443 P.2d 561 (Cal. 1968).

⁴⁸. *Id.* at 113–19.

⁴⁹. See 443 P.2d at 569 (Burke, J., dissenting).

⁵⁰. See Cal. Civ. Code § 846 (Deering 2008), setting a standard of care to that owed to a trespasser, i.e. refraining from willful or wanton behavior.

of the ability of their hosts. Paying passengers were owed a higher standard of care in line with the same rule for bailees and occupiers. There is little doubt that this line of cases goes back to the distinctions that started in Coggs.⁵¹

The modern cases reject the old distinctions, with some cases even striking down the distinction between guests and paying passengers on equal protection grounds.⁵² One argument in favor of this modern position is that it reduces the need to make distinctions between cases, and thereby spares courts such marginal determinations as whether the passenger who splits the cost of gasoline should be regarded as a guest or as a commercial customer. But on balance, the marginal cases seem few, so that it is far from clear that the “reasonable care under the circumstances” test marks any improvement.⁵³ Surely the financial relationship between the parties is one relevant circumstance. The use of ad hoc balancing therefore raises decision costs and increases the likelihood of inconsistent outcomes.

At one time, the distinction between guests and paying passengers comported well with ordinary expectations. Today the picture is more clouded: the extensive licensing provisions for drivers and elaborate rules of the road may have shifted expectations so that passengers expect people to know how to drive unless, as in some learning situations, there are good reasons to think otherwise.⁵⁴ But even here, private expectations are not the sole matter of concern. To take just one example, it is still common in many states for insurers to refuse to cover accidents caused to guests or family members for a different, but often underrated reason—the occurrence of fraud.⁵⁵ Quite simply the fear is that if the plaintiff and the driver are close friends, they will tailor their combined testimony to favor recovery in ways that cross-examination and thorough investigation cannot detect, at least at reasonable cost. The per se exclusion from recovery dampens that incentive, but, as ever, at a positive cost.

IV. Frustration and Impossibility

Coggs also proved surprisingly important in cases dealing with impossibility and frustration, most importantly Taylor v. Caldwell.⁵⁶ Taylor arose out of the destruction of the Surrey Gardens

⁵¹. See Massaletti v. Fitzroy, 118 N.E. 168 (Mass. 1917); defended in Note, The Common Law Basis of Automobile Guest Statutes, 43 U. Chi. L. Rev. 798 (1976).

⁵². See, e.g., Brown v. Merlo, 506 P.2d 212 (Cal. 1973). Earlier challenges at the federal level had been rebuffed in Silver v. Silver, 280 U.S. 117 (1929).

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⁵⁴. See, e.g., Holland v. Pitocchelli, 13 N.E.2d 390 (Mass. 1938).

⁵⁵. See, e.g., Travelers Indemnity Co. v. Transport Indemnity Co., 51 Cal. Rptr. 724 (Cal. App. 1966) (upholding a clause that excludes the named insured and its employees from coverage).

⁵⁶. 122 Eng. Rep. 310 (Q.B. 1863).

Concert Hall by fire “without [the] fault of either party”⁵⁷ between the time of the license agreement and the first of four scheduled performances. Addressing impossibility, Justice Blackburn turned to Coggs for the proposition that all bailees under a contract of commodatum are excused from liability if the thing perishes because of an act of God or a third party.⁵⁸ Clearly any excuse that works for a party held to the highest standard of care will work for bailees in the other five categories—where the standard of care is less onerous. In Blackburn’s hands this proposition lays the foundation for the general principle of impossibility, which excuses the building owner from providing his facility under its licensing arrangement with the plaintiff.

The analogy to bailments works because this license for use created divided interests in the property. But this situation differs from a bailment in one key particular: there was no separation of possession and ownership when the fire occurred. The analysis thus turns to the role of “fault” in the case. Blackburn starts with the general rule that liability in contract is strict, so that “the contractor must perform it or pay damages for not doing it, although, in consequence of [an] unforeseen accident, the performance of his contract has become unexpectedly burdensome or even impossible.”⁵⁹ That overbroad proposition does not account for the different standards of care found in the bailment cases. Sensibly enough, Blackburn therefore subjects his initial proposition to two further qualifications. The first, based in part on Coggs, subjects this absolute duty to an express or implied condition about the continued existence of some particular thing that lies at the foundation of the agreement—in this case, the music hall. After making that determination in favor of the defendant, the inquiry turns to whether its destruction occurred without the fault of either party.

Blackburn then examines prior cases where a promisor promises to marry or to paint a picture, only to die before he has any chance to perform. The long-established rule excused the executor from paying damages.⁶⁰ The best explanation for this exception starts with the proposition that courts usually enforce promises to create incentives to perform. But in the death cases, no one thinks that the defendant killed himself to escape performing a contract. Even an opportunistic defendant would not commit suicide because it was cheaper to pay damages than to perform. Therefore, the only risk that might conceivably arise in this case is that a party commits itself to a contract while concealing the fact that he or she is ill, in the hopes of either collecting free money or free work. But these improbable cases involve elaborate schemes of concealment, which move them from the class of misfortunes to that of fraud, for which remedies are ordinarily supplied. In the

⁵⁷ . Id. at 312.

⁵⁸ . Id. at 314.

⁵⁹ . Id. at 312.

⁶⁰ . See id. at 313 (citing Hyde v. Dean and Canons of Windsor, 78 Eng. Rep. 798 (1597)).

domain of sudden death through accident or misfortune, why go through the difficult exercise of calculating damages when it is cheaper to just call the whole arrangement off?

But what of Blackburn’s qualification that this excuse in the personal service contracts does not apply to a defendant who was previously at fault?⁶¹ Fault is just a chameleon here. Strikingly, none of these frustration cases takes the fault question seriously. Rather, the absence of fault is largely presumed, and rightly so. Everyone has strong incentives to take care of his own life, so that his negligence costs him far more than any expectation damages on a single transaction. No one kills himself to escape a winning contract (which most contracts are). In effect, each person’s life offers a huge performance bond to his trading partner, so that contractual liability is at best an afterthought. The total absence of moral hazard rightly pushes the entire “fault” question into the background. In short, it is better to let the whole matter lie where it is than to try to use damage remedies to fine-tune behavior.

Difficult fact issues will arise if, for example, the portrait is half done before the death of either painter or subject. Further complications also crop up if one side makes initial expenditures in anticipation of an engagement that never comes to pass. But these problems are usually small beer, for the costs often accrue, on both sides, so that the better response is to let them slide in the absence of specific contractual language. It is hard to fashion intelligible rules when only distributional questions are at stake. Better to just let caprice take its toll: stop all future performance by letting the losses lie where they fall, regardless of reliance costs.

A key variation on Taylor arises when the thing destroyed is not owned by either party, as in the sequel to Taylor, Krell v. Henry.⁶² Krell involved a license to use the windows in rooms overlooking Pall Mall to watch the coronation procession for Edward VII, which was suddenly canceled when he became ill. No mention of the coronation was contained in the lease, but the inflated price was only intelligible against this public backdrop. The Court of Appeal had to decide whether the doctrine of impossibility applied only to the destruction of a thing within the possession of either of the parties—which the coronation decidedly was not—or whether that doctrine extended to the destruction of something external to both parties.

Notwithstanding this doctrinal conundrum, the case for impossibility is stronger in Krell than in Taylor. As before, one key question is whether the impossibility defense creates some form of moral hazard. In Taylor, the defense was accepted on the ground that no one would destroy a valuable facility in order to escape a winning contract all around. Hence the peripheral concern with

⁶¹. Id.

⁶². [1903] 2 K.B. 740.

fault. But the fault question is utterly irrelevant in Krell because neither party to the lease could have influenced the cancellation of the coronation. So letting the losses lie where they fall makes sense in a rough justice sort of way. Once again legal intervention is of little value in purely distributional disputes.

Yet note the uneasiness. Lord Justice Vaughan Williams desperately tried to distinguish Krell's letting of the rooms from the hiring of a cab to take a rider from London to Epsom to watch the derby, at a suitably enhanced rate of £10.⁶³ But he never explains why the unstated coronation is a precondition for the deal when the unstated derby is not. To be sure the rooms let were uniquely suited to the coronation while the cab was, well, just a cab. But so what, when neither party had anything to do with the cancellation of either event? Again, why not let the losses lie where they fall? Vaughan Williams's willingness to award the cabman his fee (less, presumably, expenses forgone) likely stems from class-based distributional concerns not found in a fancy lease between members of the privileged classes. Yet the one substantive difference actually cuts the other way. The Coronation was never rescheduled, so the old arrangement could not be carried over to a new date. But the hypothetical Epsom Derby would in all likelihood have been rescheduled (like a World Series game), which meant that the cab could fetch a premium rate the next time around, if not from the same customer, then from someone else. Accordingly, the failure to discharge the hirer could have created a windfall for the cab driver. And this is merely one example of how ad hoc distributional arguments can lead us astray.

Conclusion

One central mission of contract law is to allocate the risk of the loss or destruction of property. Finding a single optimal rule that covers the full range of circumstances is a hopeless task, which is why the ambiguity in the term "fault" serves a useful function by hinting broadly at the diversity of circumstances. Finding those circumstances does not, however, commit us to a hopelessly ad hoc inquiry. Rather it invites an intelligent categorization of cases, each with its own applicable standard of care. Historically, the highly influential classification scheme for bailments set out in Coggs v. Bernard provides an imperfect guide as to how that is done. At no point, however, does that synthesis opt for the cost/benefit rule of the Hand formula, with its high decision costs and inconsistent results.

Modern writers often regard this judicial search for intelligent categories as a sign of the apparent inefficiency of the common law. In reality it is exactly the opposite. Of course the common

⁶³ Id. at 750-51.

law should minimize the risk of loss from certain transactions. Yet it cannot achieve that goal by adopting an unworkable formula that cannot live up to its grand aspirations. The use of more concrete situational standards achieves the desired result at far lower cost. In making these classifications, the distribution of anticipated benefits between the contractual parties serves as an effective proxy for choosing efficient rules. With professionals the uniform standard of care reduces search costs and imposes liability on those who remain in business because they know they can reach a high standard of care. With casual transactions, the nondiscrimination principle protects the volunteer while allowing his opposite number to select friends in whom he has confidence. These rules thus induce an efficient level of search for the right trading partner. It may seem odd that modern rules based on ancient Roman classifications generate highly efficient solutions. But it only proves that finding the efficient standard of fault is a task best left to those who do economics without really trying.

Readers with comments should address them to:

Professor Richard Epstein
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
repstein@uchicago.edu

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